Supreme Court, U.S.
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No. 07-516

# In The Supreme Court of the United States

SUSAN KNOX, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

*Petitioner,*

v.

THOMAS MINK; THE HOWLING PIG,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

MARCY G. GLENN
*Counsel of Record*
A. BRUCE JONES
HOLLAND & HART, L.L.P.
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8000

*Attorneys for Respondents*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

## QUESTION PRESENTED

Did the Tenth Circuit correctly apply well-settled Supreme Court authority when it held that a prosecutor is not entitled to absolute immunity for her role in advising a police officer on the form and content of a draft search warrant and supporting affidavit, where the advice was limited to the earliest stage of the police department's criminal investigation, no criminal charges had been filed or were close to being filed, there was no pending judicial proceeding, and no charges were ever filed?

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## STATEMENT OF THE CASE

The Statement of the Case in the Petition is incomplete. It quotes at length from the district court decision in Knox's favor on the absolute immunity question, but fails to include any of the Tenth Circuit's extensive analysis of that issue. Respondent provides the Tenth Circuit's analysis in the argument section of this brief, *infra* at 3-9.

Knox also omits key facts related to her role in the approval of the search warrant and affidavit, as well as the overall role of the district attorney's office in instigating the investigation. The Amicus also misstates those facts and presents other facts that have no support in or outside the record in this case.

Specifically, Knox states that Professor Peake (whose complaint led to the search and other acts that led to this lawsuit) complained to the Greeley, Colorado Police Department, which initiated an investigation of Mr. Mink. Pet. at 5. To the contrary, Professor Peake first complained directly to the district attorney's office, which assigned an investigator to the matter. The district attorney's investigator compiled a packet of information that he turned over to the police department with a request that the department contact the professor. A detective did so, which resulted in the preparation of the affidavit and search warrant that Knox then reviewed. 10th Cir. App. 81.

The Amicus' assertions that Knox reviewed the application "at the request of the judiciary," and that

"her review was identical to that which shortly thereafter was performed by the judge," Amicus Br. at 8, has no support in the record. *See infra* at 11-12. Likewise, nothing in the record establishes the accuracy of the Amicus' description of the manner in which search warrant applications are presented to judges in Colorado. *See* Amicus Br. at 5-6.

## REASONS FOR DENYING THE PETITION

The doctrine of absolute prosecutorial immunity is well-established and this Court's existing decisions are adequate to guide lower federal courts, as they fully guided the Tenth Circuit in this case. Under the functional analysis mandated by the Court's decisions, and faithfully applied by the Tenth Circuit, Knox's conduct in reviewing a police officer's search warrant and affidavit falls far on the "investigative/administrative" side of the line between a district attorney's "investigative/administrative" and "advocacy" functions. Even if there were room for disagreement as to the court of appeals' conclusion, the petition asserts at worst "the misapplication of a properly stated rule of law[,]" Sup. Ct. R. 10, which does not justify granting certiorari review.

Moreover, to reach the issue presented by Knox, the Court would need to interpret a Colorado statute – C.R.S. § 20-1-106.1 – in a manner contrary to its specific language. The Court would then be required to apply the statute based on an unclear factual

record. Given the non-federal nature of the issue, and the limited application of any such ruling, certiorari review is unwarranted.

## I. The Tenth Circuit Correctly Applied Well-Settled Precedent.

In addressing Knox's absolute immunity claim, the Tenth Circuit carefully reviewed and applied "the modern doctrine of prosecutorial immunity in § 1983 cases. . . ." Pet. App. 27a. The court of appeals traced the development of that body of law beginning with the Court's seminal decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and continuing through *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); and *Kalina v. Fletcher*, 522 U.S. 118 (1997). Pet. App. 27a-32a. Knox acknowledges that those four cases establish the appropriate "functional approach for making absolute immunity decisions." Pet. 10. Her argument is that the Tenth Circuit failed to adhere to those decisions. Pet. at 10 ("The Court of Appeals' decision fails to follow decisions from the [Supreme] Court in two respects."); *id.* at 11 ("Both the Court of Appeals' analysis and its holding are in conflict with prior decisions of this Court. . . ."). She does not suggest a vacuum in the law or a split in decisions among circuits that might warrant this Court's intervention.

In fact, the Tenth Circuit did follow *Imbler*, *Burns*, *Buckley*, and *Kalina*. After a detailed exposition of the analysis in each of those decisions as well

as relevant Tenth Circuit prosecutorial immunity cases applying the Supreme Court authority, Pet. App. 27a-34a, the court of appeals accurately summarized the law of prosecutorial immunity as follows:

> As the above cases demonstrate, there is no bright line between advocacy and investigation. It is clear that a prosecutor's courtroom conduct falls on the advocacy side of the line. *Buckley*, 509 U.S. at 274, 113 S.Ct. 2606. And it is equally clear that advocacy is not limited to filing criminal charges or arguing in the courtroom. *Id.* at 272, 113 S.Ct. 2606. Thus, especially when considering pre-indictment acts, it is important to consider other factors, such as (1) whether the action is closely associated with the judicial process, *Burns*, 500 U.S. at 495, 111 S.Ct. 1934, (2) whether it is a uniquely prosecutorial function, *id.* at 491 n.7, 111 S.Ct. 1934, and (3) whether it requires the exercise of independent professional judgment, *Kalina*, 522 U.S. at 130, 118 S.Ct. 502.
>
> In sum, a prosecutor is entitled to absolute immunity for those actions that cast him in the role of an advocate initiating and presenting the government's case. Absolute immunity, however, does not extend to those actions that are investigative or administrative in nature, including the provision of legal advice outside the setting of a prosecution. *See Imbler*, 424 U.S. at 430-31, 96 S.Ct. 984; *Burns*, 500 U.S. at 486, 493-94, 111 S.Ct. 1934.

Pet. App. 33a-34a. The court of appeals never remotely intimated that this Court's existing decisions provide insufficient guidance to resolve the immunity issue in this case.

The Tenth Circuit began its application of the controlling precedent with the observation that "the district attorney does not contend she acted as an advocate 'intimately involved' in a judicial proceeding." Pet. App. 34a. "Rather, she alleges her role was limited to review and approval of the search warrant application; she does not even contend she evaluated whether probable cause existed to arrest or press charges." *Id.* The panel further emphasized that when Knox reviewed the affidavit, (a) "police had only the allegations of Professor Peake and had not yet confirmed the authorship of the articles contained in *The Howling Pig*"; (b) "the search of Mink's residence was part of a continuing effort to obtain evidence"; (c) "the attorney's review was, at most, legal advice as to the sufficiency of the affidavit"; and (d) perhaps most important "the district attorney was far from filing charges . . . and subsequent events show that the office came to believe the case could not be prosecuted." *Id.* at 34a-35a.

The Tenth Circuit then concluded that Knox's "review of the affidavit cannot be said to be a uniquely prosecutorial role." *Id.* at 35a. The court of appeals reasoned:

> While it is laudable that a legal review occur before the police proceed to a magistrate for

> a warrant, the Supreme Court made it clear in *Burns* that a legal review for the sufficiency of evidence to support probable cause is not sufficient to confer absolute immunity. Absolute immunity applies to the "prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Burns*, 500 U.S. at 494, 111 S.Ct. 1934. And while it may at times be difficult to discern the line between "investigation" and "advocacy," here we do not even have a case where the prosecutor was preparing for her "role as advocate for the State." *Buckley*, 509 U.S. at 271, 113 S.Ct. 2606. No one suggests the district attorney was preparing for a judicial proceeding in merely reviewing the affidavit.

*Id.*

The Tenth Circuit then acknowledged that "the review of the affidavit can be said to require the exercise of professional judgment," but it observed that "that is true every time a prosecutor provides legal advice." *Id.* Following "the Supreme Court's functional approach," the court of appeals correctly "look[ed] to which role the prosecutor is performing – advocate or investigator." *Id.* at 35a-36a. It concluded: "Here, the review of the affidavit squarely falls on the side of investigatory legal advice, and not advocacy before a judicial body. The deputy district attorney played no role in preparing the affidavit, nor was she involved in preparing, analyzing, and presenting pleadings to a court." *Id.* at 36a.

The Tenth Circuit distinguished this case from "those cases where prosecutors have been absolutely immunized for drafting, filing, and arguing in support of an arrest or search warrant," because in those cases, "the prosecutor was acting as an advocate – evaluating evidence, preparing pleadings, and appearing in court." *Id.* (citations omitted). In the instant case, by contrast, "the prosecutor's function was not that of an advocate; her function was to provide legal advice outside the courtroom to aid a nascent investigation." *Id.* Ultimately, the Tenth Circuit concluded, because "the prosecutor was not preparing her case[,]" absolute immunity "does not attach." *Id.*

Knox suggests that the Tenth Circuit somehow strayed from this Court's "functional approach" to prosecutorial immunity, *see* Pet. at 10, 16-19, 21-22, but the court of appeals actually did just the opposite. The panel took a hard look at precisely "what the attorney did," Pet. App. 37a, which is the essence of a functional analysis. It held against absolute immunity based on the following acts that Knox either did or did not undertake:

- She was not "'intimately involved' in a judicial proceeding[,]" *id.* at 34a;
- "[H]er role was limited to review and approval of the search warrant application[,]" *id.*;
- She did not "evaluate[ ] whether probable cause existed to arrest or press charges[,]" *id.*;

- She "was far from filing charges at the time of the search," *id.* at 35a;
- She was not "preparing for a judicial proceeding[,]" *id.*;
- She "played no role in preparing the affidavit, nor was she involved in preparing, analyzing, and presenting pleadings to a court[,]" *id.* at 36a;
- "[H]er function was to provide legal advice outside the courtroom to aid a nascent investigation[,]" *id.*; and
- She "was not preparing her case[,]" *id.*

On these facts, as alleged in the First Amended Complaint and established in Knox's affidavit in support of her motion to dismiss, the Tenth Circuit faced no shortage of directly on-point Supreme Court authority. *First*, in *Imbler*, the Court held that a prosecutor is absolutely immune only for those activities "intimately associated with the judicial phase of the criminal process," 424 U.S. at 430-31, yet here it was undisputed that no judicial proceedings had commenced, since the police department was in the early stage of its investigation. *Second*, in *Burns*, the Court squarely rejected absolute immunity for prosecutors' conduct in giving legal advice to the police during a pretrial factual investigation – which is all that was occurring here: "We do not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process' . . . that it

qualifies for absolute immunity." 500 U.S. at 493 (quoting *Imbler*, 424 U.S. at 430). *Third*, the Court has repeatedly confirmed this holding in *Burns*. *See Kalina*, 522 U.S. at 126 ("[The] provision of legal advice to the police during their pretrial investigation of the facts [is] protected only by qualified, rather than absolute, immunity."); *Buckley*, 509 U.S. at 271 ("[P]rosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police.").

In short, the opinion of the Tenth Circuit is straightforward, try as Knox might to make it complicated. It properly applies well-settled law. Even if this Court questions the court of appeals' ultimate conclusion, the case does not warrant certiorari review because the Tenth Circuit properly stated the controlling rule of law on prosecutorial immunity but, at worst, misapplied that law. Sup. Ct. R. 10.

## II. The Petition Does Not Otherwise Present An Issue Deserving This Court's Review.

Certiorari also should be denied because this case centers on the interpretation of a state statute under disputed facts. Knox and her Amicus assert that she was reviewing the search warrant application and affidavit at the request of a Colorado state court, pursuant to a Colorado statute, C.R.S. § 20-1-106.1. Knox ignores inconvenient language in the statute contradicting her argument, which states that district attorneys are to render "legal advice to peace officers" in this review process. Thus, under the plain language of the

statute, district attorneys are functioning in their role as legal advisors to the *police*, and are neither primarily providing legal assurances to a *court* nor acting as advocates. Indeed, Knox's argument turns the statute on its head by suggesting that its purpose is to provide legal support or assistance to a magistrate, who presumably knows the law of probable cause, rather than to a police officer who needs assistance in assuring that the search warrant and affidavit are legally valid before presenting them to the magistrate. Since the interpretation of a single state statute is at the heart of Knox's argument – and since that interpretation is at least one step removed from the federal issue of absolute immunity for district attorneys from Section 1983 claims – this is not a case worthy of a grant of certiorari.[1]

It is also significant that, despite its "quasi-judicial" language, the Colorado statute does not provide absolute immunity to prosecutors, but allows for an action if a prosecutor performs his or her duties in bad faith. C.R.S. § 20-1-106.1(2). *See Kalina,* 522

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[1] Knox further misstates the terms of the Colorado statute in her statement of the Question Presented, when she says that she was "review[ing] . . . a search warrant for sufficiency of probable cause pursuant to a specific state statute *requiring her to do so* before the search warrant's presentation to a judge by the police. . . ." Pet. at *i*. The statute does not require the district attorney to review all search warrants before they may be presented to a court. Nor does it specifically require review for sufficiency of probable cause – as opposed to, for example, form and compliance with procedural requirements.

U.S. at 132 (Scalia, J., concurring) (when Section 1983 was enacted, public officials could assert "quasi-judicial immunity," which "was more akin to what we now call qualified, rather than absolute, immunity"). If Colorado has not chosen to proclaim absolute immunity for its prosecutors acting under Section 20-1-106.1(2), there is no reason for this Court to intervene to do so.

Additionally, the disputed factual record in this case will preclude the Court from cleanly interpreting the Colorado statute as applied to Knox's conduct. The linchpin of Knox's argument is that she was acting at the behest of a court. Pet. at 17. The Amicus makes a similar assertion without citing any record support. Amicus Br. at 8. In fact, the record does not establish that any judge actually asked Knox to review the affidavit and warrant in this case – nor that any judge has done so in any other case. In her affidavit filed in the trial court, Knox stated as follows:

> As part of our prosecutorial duties, I and the other attorney members of the District Attorney's Office are periodically contacted by peace officers from the various law enforcement entities in the Nineteenth Judicial District for the purpose of reviewing affidavits and warrants for arrest and search to review their legal sufficiency and support for probable cause. *It is my understanding* that the county and district judges in the Nineteenth Judicial District who are requested by peace officers to sign these warrants *either assume*

> *or specifically ask* for verification that the affidavit and warrant in question have been reviewed by a member of our District Attorney's Office.

Resp. App. 1-2 (emphasis added). As revealed by this quote, Knox and the Amicus have taken Knox's "understanding" concerning what judges "assume," and stated both as undisputed facts. In truth, the record does not establish that the magistrate either requested or expected that Knox would review the affidavit and warrant.

Nor is it clear that the police officer in question presented the search warrant materials to Knox for this reason. Although Knox states that the criminal complaint in this matter was made to the Greeley Police Department, Pet. at 5, the complainant, Professor Peake, first approached the district attorney's office directly. It appears that the district attorney referred him to the police department, with a request that the matter be investigated. 10th Cir. App. 81. Thus, it is certainly plausible that the officer presented the search warrant materials to an assistant district attorney because the matter had originated with the district attorney's office, and not because a judge required him to do so.

While Knox argues that the Tenth Circuit decision "will lead to significant disruption for prosecutors throughout the United States," Pet. at 22, this case actually centers on a particular statutory provision of a single state (as one assistant district attorney

"understood" that some state judges "assumed" the statute applied) and on a less than clear factual record. Any potential prosecutorial confusion – beyond being remote – would be limited to how things are done in a single judicial district in Colorado. Therefore, given the limited application of the Tenth Circuit's ruling, it is not an appropriate candidate for review by this Court.

## CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

MARCY G. GLENN
*Counsel of Record*
A. BRUCE JONES
HOLLAND & HART, L.L.P.
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8000

*Attorneys for Respondents*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 04 B 0023 (CBS)

THOMAS MINK and
THE HOWLING PIG, an unincorporated association,

Plaintiffs,

v.

KEN SALAZAR, in his official capacity
as Attorney General of the State of Colorado;
A.M. DOMINGUEZ, JR., District Attorney for the
19th Judicial District, in his official capacity, and
SUSAN KNOX, a Deputy District Attorney
working for the 19th Judicial District
Attorney's Office, in her individual capacity,

Defendants.

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## AFFIDAVIT OF SUSAN KNOX

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The undersigned being duly sworn deposes and states the following facts are true and based upon her personal knowledge.

1. I am a Chief Deputy District Attorney for the Nineteenth Judicial District and have served as a Deputy District Attorney for approximately the past six and one half years. As part of our prosecutorial duties, I and the other attorney members of the District Attorney's Office are periodically contacted by peace officers from the various law enforcement entities in the Nineteenth Judicial District for the

purpose of reviewing affidavits and warrants for arrest and search to review their legal sufficiency and support for probable cause. It is my understanding that the county and district judges in the Nineteenth Judicial District who are requested by peace officers to sign these warrants either assume or specifically ask for verification that the affidavit and warrant in question have been reviewed by a member of our District Attorney's office.

2. Sometime in mid-December of 2003, I was working in our office when Detective Warren of the Greeley Police Department came to our office with the affidavits and search warrants which are the subject of this lawsuit. His purpose was that outlined in the above paragraph. Since I was available for this purpose, Detective Warren came to me. I reviewed the affidavits and warrants in question and found their form to be appropriate for submission to a judge of our judicial district. I was not involved in any way in the investigation which had been conducted by Detective Warren and had no personal knowledge of the facts contained in the affidavit or affidavits in question. I have known Detective Warren for some time and believe him to be a very able and qualified peace officer. There was no reason of any type to question the facts contained in these affidavits.

3. I do not believe the affidavit or affidavits in question referred to any specific Colorado crime by statutory reference number and I have never before been involved in any prosecution for criminal libel.

4. A criminal investigation, in my belief, involves gathering facts and evidence which could potentially be presented to a District Attorney's Office for analysis and filing of criminal charges, if appropriate. In Colorado, a felony cannot be filed by a peace officer, but only by a District Attorney. The task which I performed in this particular situation is one I have done a number of times and is, by its very nature, something which the judges of our district want to be done by a prosecutor and not a peace officer.

5. The above facts constitute my only personal involvement in this matter.

FURTHER, THE AFFIANT SAYETH NAUGHT.

/s/ Susan Knox
SUSAN KNOX

STATE OF COLORADO )
) ss.
COUNTY OF _____ )

The foregoing instrument was acknowledged before me this 8th day of March, 2004, by Susan Knox.

Witness my hand and seal.

/s/ Veronica R. Elkins
Notary Public